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Summary record of the 870th meeting
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Chairperson: Mr. Illescas ..... (Spain)

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08-39404 (E)

The meeting was called to order at 3.15 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 27 (*Carriage preceding or subsequent to sea carriage*)

1. **Ms. Downing** (Australia), referring to her Government's written comments (A/CN.9/658, paras. 41-42), said that, as currently worded, draft article 27 imposed on shippers the nearly impossible burden of proving where damage or loss had occurred before its provisions could have any practical effect. Furthermore, unless a reference to national law was inserted, her own Government and others would have difficulty regulating inland carriers under draft article 27.

2. **Ms. Halde** (Canada) said that her delegation had long argued for the inclusion of a reference to national law to ensure that the maritime limitations established by draft article 27 would not have any impact on the land portion of a transport and to ensure that national limitations on inland carriers were preserved. An acceptable alternative would be to allow States parties to formulate a reservation to the convention to that effect. While aware that the concept of the maritime performing party could cover the land transportation issue, Canadian industry had expressed major concerns over the potential ambiguity and resultant misapplication of the draft convention to inland carriers.

3. **Mr. Hu** Zhengliang (China), supporting the Australian position, observed that the situation in China was similar, because China was not a party to the Convention on the Contract for the International Carriage of Goods by Road (CMR) or the Convention concerning International Carriage by Rail (COTIF). His delegation had consistently advocated the inclusion of a reference to national law in draft article 27.

4. **Ms. Eriksson** (Observer for Finland) said that, while her Government favoured having the draft convention cover door-to-door transport, it was concerned about the rules for multimodal transport in draft article 27 and agreed that it should include a reference to national law.

5. Another major problem had to do with non-localized damages. The maritime rules would apply to the land transport leg if the shipper could not prove that the damage had occurred during transport by a mode other than by sea, which was extremely difficult to do, especially in the case of containers. Global harmonized rules for shipping were necessary, but the different worldwide trade and transport patterns must be recognized. In Europe, land transport conventions were applied with significantly higher limitation amounts than were currently stipulated in the draft convention. Unfortunately the special rule on limits of liability for non-localized damage had been eliminated from the draft, so that there was a clear link between draft article 27 and draft article 61; the low limits set in the latter compounded the problem in the case of non-localized damage. To address the different multimodal transport situations worldwide and attract as many signatories as possible to the convention, an arrangement was needed to regulate the multimodal liability aspects in a way that was fair to both shipper and carrier. That could be done via a reservation clause.

6. **Mr. Elsayed** (Egypt) proposed that, since draft articles 27 and 12 both dealt with the period of responsibility of the carrier, draft article 27 should be deleted and the text combined with that of draft article 12.

7. **Mr. Sharma** (India), concurring with Australia on the need to include a reference to national law, observed that the Asian countries were not parties to regional conventions like CMR. A reference to national law would also serve to clear up any ambiguity about the applicability of the limits of liability in the draft Convention. The understanding in Working Group III (Transport Law) had been that the Convention would apply where there was no applicable international instrument but would yield to another applicable international instrument.

8. **Mr. Schelin** (Observer for Sweden) said that his delegation shared Finland's concerns and believed the Commission should seek to approve a text acceptable to the large majority of States, which meant a compromise text. A number of States required a reservation to draft article 27, and the limitation amounts would also be an important issue. Compromise could be achieved and Sweden was willing to join the discussion.

9. **Ms. Czerwenka** (Germany), referring to her Government's written comments (A/CN.9/638/Add.11, paras. 3-5 and 11-12), said that her delegation supported the reintroduction of a reference to national law. In any case, draft article 27 was no longer very important in the scheme of the draft convention, because the Working Group had deleted the provision on the limits that would apply in cases of non-localized damage, which meant that the relatively low limits of liability set in draft article 61 would apply in most cases. A compromise must be reached on draft article 27, and one solution would be to include a reservation clause regarding "maritime plus" contracts.

10. In addition, since the Working Group had concluded that draft article 27 was not a conflict of conventions provision, the statement in the chapeau that the convention did not "prevail" was misleading. Rather, there should be wording to the effect that the convention did not "apply" in the cases set out in subparagraphs (a) to (c).

11. **Mr. Miller** (United States of America) said that draft article 27 was already part of a compromise proposed by more than thirty countries and supported by others. There was therefore no need for a new compromise. Many delegations, including his own, had refrained from insisting on the inclusion of preferred positions in the interests of general consensus on the text. It was not appropriate at the current stage to insert a reference to national law or to introduce a reservation clause.

12. He had been astonished to hear the limits of liability under the draft Convention described as low: for packaged goods they were much higher than under other carriage regimes like CMR or COTIF.

13. **Mr. Berlingieri** (Italy), concurring with the United States, said that his delegation could not support the proposals for a reference to national law in draft article 27. All certainty about the scope of the convention would disappear, because the provisions of the different national transport laws were not known the world over, and could be changed at any time by States, leaving both carriers and shippers unclear as to what rules applied to the contracts they had concluded.

14. On the question of non-localized damage, it was reasonable to adopt the rule that unless there was proof that loss or damage had occurred elsewhere, it would be deemed to have occurred on the sea leg of the transport because draft article 27 covered "maritime plus" contracts in which the maritime section was the fundamental leg that triggered the applicability of the convention in the first place.

15. **Ms. Slettemoen** (Norway) said that her delegation would have preferred a reference to national law but agreed with the United States that the draft text as it stood represented a compromise. However, the possibility of coming back to draft article 27 might be left open if other parts of the compromise were altered later in connection with other provisions. As to the German suggestion to change "prevail" to "apply", article 30 of the Vienna Convention on the Law of Treaties used the word "prevail", and it should be retained in the draft convention as well.

16. **Mr. Blake-Lawson** (United Kingdom), **Mr. Delebecque** (France), **Mr. Alba Fernández** (Spain), **Mr. Tsantzalos** (Greece) and **Mr. Sandoval** (Chile) said that the current text of draft article 27 should be retained.

17. **Mr. Elsayed** (Egypt) said that he supported the proposal of Australia and Finland to refer to national law. The non-maritime leg of a contract should be covered by national law, and the draft convention should apply only to the maritime leg, because a shipper had no way of knowing where damage had occurred.

18. **Mr. Mayer** (Switzerland), agreeing that the text of article 27 should be retained as it stood, said that he would, however, support Germany's proposal to find wording other than "do not prevail", because draft article 27 was not a conflict of conventions clause but reflected a network approach and could not be compared to the Vienna Convention.

19. **Mr. van der Ziel** (Observer for the Netherlands) said that article 27 was already a compromise text, and the Commission should adhere to the compromise. As to the German proposal, he believed that the phrase "do not prevail" was the correct one. The draft convention and other international conventions must be read in the context of different liability regimes, but the draft convention in principal prevailed unless there were conflicting provisions in one of the other applicable conventions.

20. **Mr. Shautsou** (Belarus) said that his delegation favoured retaining the agreed compromise text of draft article 27. The phrase "do not prevail" was the correct wording because it allowed individual provisions of the

draft convention to apply where there was no conflict. As Italy had argued, a reservation clause regarding national legislation would affect the stability of the draft convention and should not be introduced.

21. **Mr. Sato** (Japan) said that his delegation agreed with all those who supported retaining the draft article in its current form, as it represented a compromise. He had no firm views on whether the draft article embodied a conflict of conventions or a network approach, but felt that "prevail" was the right term. The draft article as it stood enabled a court to give preference to other conventions that applied to the limited situation described in the article but did not prevent it from giving preference to the draft convention if it saw fit.

22. **Ms. Czerwenka** (Germany) said that the reason for changing "prevail" to "apply" was to make it clear that draft article 27 was not a conflict of conventions provision. Provided it was known where the damage had occurred and provided it had occurred where another international instrument applied, the provisions of the latter instrument would apply.

23. **The Chairperson** said that there appeared not to be a majority in favour of including a right of reservation or a reference to national law. With regard to the choice of verb between "prevail" and "apply", the drafting group could decide.

24. *Draft article 27 was approved in substance and referred to the drafting group.*

Draft articles 28 (Delivery for carriage), 29 (Cooperation of the shipper and the carrier in providing information and instructions), 30 (Shipper's obligation to provide information, instructions and documents) and 31 (Basis of the shipper's liability to the carrier)

25. *Draft articles 28, 29, 30 and 31 were approved in substance and referred to the drafting group.*

Draft article 32 (Information for compilation of contract particulars) and definition of "contract particulars"

26. **Ms. Czerwenka** (Germany) noted that, as her delegation had pointed out in its written comments (A/CN.9/658/Add.11, paras. 13-14), the shipper was subject to strict liability if the information it was obliged to provide under draft articles 32 and 33 was inaccurate. Moreover, under draft article 81 the shipper's liability could not be limited, whereas under draft article 61 the carrier enjoyed limited liability for all breaches of its obligations. The liability regime was thus unbalanced to the detriment of the shipper. Her delegation would therefore propose deleting the verb "limits" in draft article 81, paragraph 2, in order to allow the parties to agree contractually to a limitation of the shipper's liability.

27. **Mr. Miller** (United States of America) recalled that the Working Group, after much discussion, had concluded that there was no practical way to limit the shipper's liability. Although it might be appropriate in certain cases for the parties to agree contractually to different terms, that was provided for in draft article 82 on special rules for volume contracts. There was no need to change draft articles 32 and 33 or draft article 81.

28. **Ms. Peer** (Austria) said her delegation agreed that there was currently an imbalance between shipper and carrier interests, and it supported the proposed change.

29. **Ms. Downing** (Australia) said that her delegation supported the German proposal. As it had indicated in its written comments (A/CN.9/658, para. 8), Australia had some concerns about the balance of interests in the draft convention. Although it was difficult to set an appropriate general cap on the shipper's liability, the shipper should have the freedom to seek to limit its liability contractually, for example, to the amount of insurance it was able to obtain.

30. **Mr. Schelin** (Observer for Sweden) said that his delegation saw merit in the German proposal, which could benefit both parties because it would make it easier for the shipper to insure its liability. A shipper's general liability insurance policy might not cover the risks described in draft articles 32 and 33, and in any case insurance companies were generally unwilling to insure unlimited liability.

31. **Mr. van der Ziel** (Observer for the Netherlands) said he assumed that Germany's aim was to allow the shipper to negotiate a monetary limit on its liability. The issue of capping the shipper's liability had been discussed, and the current solution was part and parcel of the compromise. His delegation would not be in favour of reopening the whole package.

32. **Mr. Kim** In Hyeon (Republic of Korea) said that his delegation associated itself with the statement by the representative of the United States and preferred to leave draft article 81 unchanged. In fact, the Working Group had not been able to find any practical way to set a limit on the shipper's liability.

33. **Ms. Talbot** (Observer for New Zealand) said that her delegation supported the comments of Austria and Sweden.

34. **Mr. Sato** (Japan) said that, although his delegation had not favoured a mandatory rule on shipper's liability, it had some sympathy for the German proposal. However, the proposed change to draft article 81, paragraph 2, would affect not only the obligations under draft article 32 but also the shipper's obligations of disclosure relating to dangerous goods under draft article 33, and perhaps no limitation of those obligations should be allowed. If the question were reopened, the Commission should be very careful about the scope of freedom of contract. Although his delegation tended to prefer to maintain the compromise solution and retain the current wording of draft article 81, it could consider a more limited amendment.

35. **Mr. Mayer** (Switzerland) expressed support for the German proposal and said that he had no recollection of draft article 81, paragraph 2, being part of a compromise.

36. **Ms. Czerwenka** (Germany), responding to the Netherlands, again argued that under draft article 81, paragraph 2, it was not currently possible for the parties to limit the shipper's obligations and hence liability contractually. That was unfair, since draft article 61 set specific limits on the carrier's liability for all breaches of its obligations. The issue related not only to draft article 32, but also to draft article 33. Her delegation was simply trying to strike a better balance, but was, of course, open to compromise.

37. In that connection, she was puzzled by some delegations' reference to an earlier compromise. The Working Group had indeed approved a text, but it was the Commission's task to review it. It was a matter of finding a balanced text that was acceptable to most delegations, not of reopening issues or questioning compromises that might have been agreed by some, but not all, delegations in the Working Group.

38. **Mr. Mollmann** (Observer for Denmark) said that two different issues were being discussed. With regard to the introduction of a general limitation on the shipper's liability, the representative of the United States was correct in saying that it would be very difficult for the Commission to agree on a rule. With regard to the possibility of contracting on terms other than those set out in the Convention, his delegation agreed that the Convention was currently unbalanced; however, it was unbalanced not in favour of the carrier, as the German delegation argued, but in favour of the shipper. Indeed, draft article 81, paragraph 2, subparagraph (a), prevented the parties from contracting on terms that increased the shipper's obligations; nothing, however, prevented the parties from contracting on terms that increased the carrier's obligations. His delegation had accepted that situation in earlier discussions but was opposed to making the Convention even more unbalanced by allowing the parties to the contract to limit the shipper's obligations. The current version of the text should, therefore, be retained.

39. **Mr. Morán Bovio** (Spain) said that his delegation failed to understand why draft article 32 raised so many concerns. The only obligation it placed on the shipper was to provide, in a timely manner, the information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records. Without such information, those documents or records could not be issued and the goods could not be transported. The current version of draft article 32 should, therefore, be retained.

40. **Mr. Sharma** (India) said that his delegation had no problem with draft article 32. With regard to draft article 81, he recalled that, during its discussions regarding the liability of the carrier, the Working Group had agreed that there was no practical way of setting specific limits on the liability of the shipper. However, the German proposal to delete the word "limits" simply allowed the parties to decide that matter contractually and would not affect the compromise. His delegation was, therefore, sympathetic to the proposal.

41. **Ms. Slettemoen** (Norway) said that her delegation agreed with the Dutch delegation that simply deleting the word "limits" was not the best solution. Any amendment should deal more specifically with the limits of liability.

42. **Mr. van der Ziel** (Observer for the Netherlands) confessed that he had understood the German proposal to relate only to the possibility of placing a monetary cap on the shipper's liability; he now realized that it also related to obligations of a non-monetary nature, which was another matter altogether. The obligations set out in draft articles 30, 32 and 33 related not only to contractual relations, but also to safety and the proper performance of the transport itself. Therefore, while the part of the proposal relating to liability might be open to compromise, the part relating to obligations was unacceptable to his delegation, for the reasons set out by the representative of Spain.

43. **Ms. Halde** (Canada) said that her delegation agreed with Germany that the shipper should be able to limit its liability through contractual arrangement.

44. **Mr. Delebecque** (France) said that his delegation had no problem with draft article 32. With regard to draft article 81, it was open to the idea of allowing the parties to limit the liability of the shipper contractually, but only in relation to certain obligations — the shipper's liability in relation to obligations relating to dangerous goods, for example, should not be limited — and only where the breach was due neither to wilful misconduct nor to gross negligence.

45. **Ms. Slettemoen** (Norway) said that, like the Netherlands, her delegation supported the German proposal with regard to the shipper's liability, but not with regard to the shipper's obligations in general.

46. **Ms. Czerwenka** (Germany) explained that her delegation's intention was only to allow for contractual limitation of the shipper's monetary liability, not its substantive obligations.

47. **The Chairperson** said that since draft article 81 was not yet under consideration, the German delegation still had time to refine its proposal, taking into account the concerns raised. He took it that the Commission wished to approve draft article 32 and, in the absence of any comments, the related definition of "contract particulars" contained in draft article 1, paragraph 23.

48. *Draft article 32 and draft article 1, paragraph 23, were approved in substance and referred to the drafting group.*

The meeting was suspended at 4.45 p.m. and resumed at 5.25 p.m.

49. **The Chairperson** informed the Commission that, following consultations between the delegation of Germany and the secretariat, it had been decided that the current wording of draft article 27 could be retained so that the drafting group would not need to decide between the "prevail" and "apply".

50. **Mr. Sekolec** (Secretary of the Commission) explained that, once approved, the draft convention would be reproduced in annex to the report of the Commission on the work of its forty-first session. The Sixth Committee would consider that report at the sixty-third session of the General Assembly and would prepare a draft resolution for adoption by the Assembly, adopting the draft convention and opening it for signature. It was the Commission's practice to request the General Assembly to open such instruments for signature without substantial renegotiation since the Assembly, as a political body, was not competent to consider it in detail. Draft instruments could also be adopted at a diplomatic conference. However, in addition to the budgetary implications that such an approach would entail, the draft convention was very long; at least three weeks would be needed if the participants were to vote separately on each article, and the result would be unpredictable. Several recent international conventions had been negotiated entirely in the Commission, and the General Assembly had demonstrated its confidence in the Commission's technical knowledge and political wisdom by opening those instruments for signature without further negotiation; he thought it likely that that practice would be followed in the case at hand.

Draft article 33 (Special rules on dangerous goods)

51. *Draft article 33 was approved in substance and referred to the drafting group.*

Draft article 34 (Assumption of shipper's rights and obligations by the documentary shipper) and definitions of "documentary shipper"

52. **The Chairperson** noted that the definition of "documentary shipper" contained in draft article 1, paragraph 9, was relevant to the content of draft article 34.

53. **Ms. Czerwenka** (Germany), drawing attention to her delegation's written comments (A/CN.9/658/Add.11, para. 15), said that the draft article went too far by making the documentary shipper subject to all the

obligations and liabilities imposed on the shipper and, apparently, establishing their joint and several liability. In draft article 1, paragraph 9, it was not clear in practice which party had the burden of proving that the documentary shipper had accepted to be named as "shipper".

54. **Mr. Schelin** (Observer for Sweden) said it seemed reasonable that documentary shippers should bear some responsibility when they substituted for the shipper; that was particularly true if they were responsible for the loading of the ship. However, he did not think that any joint liability was implied.

55. *Draft article 34 and draft article 1, paragraph 9, were approved in substance and referred to the drafting group.*

Draft article 35 (Liability of the shipper for other persons)

56. *Draft article 35 was approved in substance and referred to the drafting group.*

Draft article 36 (Cessation of shipper's liability)

57. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 46-47), said that draft article 36 should be deleted. It was at odds with the freedom of contract provisions elsewhere in the draft convention and established an imbalance to the detriment of the shipper, since the parties would not be free to put a time limit on when the shipper's liability would cease.

58. **Ms. Halde** (Canada) said that her delegation agreed with the representative of Australia; the draft article appeared to create never-ending liability for the shipper, which was contrary to draft article 64 (period of time for suit); either it should be deleted, or a provision linking it to draft article 64 should be included in order to make it clear that the latter article would apply to all claims.

59. **Mr. Sandoval** (Chile) suggested that for linguistic reasons, the words "*carecerá de efecto alguno*" should be changed to "*no producirá efecto ninguno*" in the Spanish text of the draft article.

60. **Ms. Peer** (Austria) said that her delegation agreed with the proposal to delete draft article 36.

61. **Mr. Lebedev** (Russian Federation), supported by **Ms. Slettemoen** (Norway), pointed out that paragraphs 107 and 108 of the report of Working Group III (Transport Law) on the work of its twenty-first session (A/CN.9/645) did not provide a rationale for the inclusion of draft article 36. The provision appeared superfluous, but he would be interested to know whether an explanation of its function appeared in an earlier report of the Working Group.

62. **Mr. Schelin** (Observer for Sweden) recalled that in the past, some members of the Working Group had argued that the draft article was needed. He had never understood the rationale and agreed that it should be deleted; it might lead to confusion in the context of draft article 81, which also covered derogation from the shipper's liability. Moreover, if the Commission should decide that it wished to allow the parties to a contract to set a cap on the shipper's liability, draft article 36 would be in direct contradiction to that freedom of contract.

63. **Mr. Imorou** (Benin), **Mr. Elsayed** (Egypt), **Ms. Czerwenka** (Germany), **Mr. Sharma** (India) and **Ms. Talbot** (Observer for New Zealand) said that they associated themselves with the delegations that had called for the deletion of draft article 36.

64. **Mr. Shautsou** (Belarus) suggested that the draft article might be useful in the context of the economic implications of the shipper's liability.

65. **The Chairperson** said it appeared that the majority of the Commission's members wished to delete the draft article.

66. *Draft article 36 was deleted.*

The meeting rose at 6 p.m.